DEPARTMENT OF STATE REVENUE

04-20070250.LOF

Letter of Findings Number: 07-0250
Sales and Use Tax
For the Years 2002-2005

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ISSUES

I. Sales and Use Tax–Prizes.

Authority: I.C. § 6-2.5-3-1; I.C. § 6-2.5-3-2; I.C. § 6-2.5-3-6; I.C. § 6-2.5-4-1; IC § 6-8.1-5-1; *Maurer v. Indiana Dep't. of State Revenue*, 607 N.E.2d 985 (Ind. Tax Ct. 1993).

Taxpayer protests the imposition of use tax with respect to vehicles given away as part of a promotional giveaway.

II. Sales and Use Tax–Complimentary Meals and Merchandise.

Authority: *Horseshoe Hammond, Inc. v. Indiana Dep't of State Revenue*, 865 N.E.2d 725 (Ind. Tax Ct. 2007), *transfer denied*, 2007 Ind. Lexis 641.

Taxpayer protests the imposition of use tax with respect to complimentary meals and merchandise transferred to customers.

III. Sales and Use Tax–Expense Purchases.

Authority: IC § 6-2.5-3-2; IC § 6-8.1-5-1; IC § 6-8.1-5-4.

Taxpayer protests the imposition of use tax on certain expense purchases.

STATEMENT OF FACTS

Taxpayer is a company that operates a riverboat casino in Indiana. After an audit, the Indiana Department of Revenue ("Department") determined that Taxpayer owed sales and use tax and assessed a negligence penalty for the 2002, 2003, 2004, and 2005 tax years. The Department found that Taxpayer had made a variety of purchases on which the Indiana sales tax was not paid at the time of purchase nor was use tax remitted to the Department. Taxpayer protested this imposition of the tax and penalties. Taxpayer declined an administrative hearing and requested that the Letter of Findings be issued based upon the information that Taxpayer had submitted during the course of protest. Further facts will be supplied as required.

I. Sales and Use Tax–Prizes.

DISCUSSION

Pursuant to IC § 6-8.1-5-1(c), all tax assessments are presumed to be accurate, and the taxpayer bears the burden of proving that an assessment is incorrect.

Taxpayer protests imposition of use tax with respect to vehicles given away as part of a promotional giveaway. Taxpayer asserts that its purchases and use of the vehicles in Indiana are not subject to sales and use tax because it neither owns nor uses the vehicles in Indiana. Taxpayer maintains that the relevant transaction is actually a transaction between the winning contestant and the car or boat dealer, and that this transaction is the one that triggers the imposition of sales and use tax.

The nature of the vehicle giveaways would work in this manner: Taxpayer would display the vehicle at its casino during the contest period. Contestants would try to win the vehicle. If the contestant was the winner of the vehicle, Taxpayer would pay the dealer that provided the vehicle the fair market value of the vehicle. The contestant would go to the dealer and the vehicle would be handed over to the contestant, who would be responsible under the terms of the contest for all applicable taxes and registration of the vehicle.

Indiana imposes "an excise tax, known as the use tax," on tangible personal property that is acquired in retail transactions and is stored, used, or consumed in Indiana, regardless of the transaction's location or of the retail merchant conducting the transaction. IC § 6-2.5-3-2(a). In addition, vehicles, aircraft, and watercraft, are subject to use tax when acquired in isolated or occasional sales. IC § 6-2.5-3-2(b).

A. Use of Vehicle.

IC § 6-2.5-3-1 (a) defines "use" as "the exercise of any right or power of ownership over tangible personal property."

In *Maurer v. Indiana Dep't. of State Revenue*, 607 N.E.2d 985 (Ind. Tax Ct. 1993), the court found that a charity raffled-automobile, for which the charity had paid the fair market value to the dealer and the raffle winner had picked up from the dealer, was acquired by the charity in a retail transaction subject to tax (but for the charity's exemption from taxation). The court reasoned that a retail transaction occurred because the title of the car was transferred from the dealer to the charity upon payment. *Id.* The Tax Court found that the transaction between the raffle winner and the charity was not a retail transaction for an automobile, but was a transaction for a raffle ticket. *Id.* at 989.

In this case, almost exactly the same fact situation arose as the one in *Maurer*. The only difference in this

case is that Taxpayer in the current case is not an exempt entity. The effective result of the drawing was a retail transaction between the car or boat dealer and Taxpayer, followed by a transfer to the winning contestant, even though Taxpayer never had registered title in its name. *Id.* at 988. Accordingly, Taxpayer and the vehicle dealer engaged in a transaction subject to sales and use tax. *See* IC §§ 6-2.5-3-2(a) & 6-2.5-4-1(b). Further, by giving the vehicle away, Taxpayer has exercised a right or power of ownership–i.e., used the vehicle in Indiana within the statutory meaning. IC § 6-2.5-3-1(a). Taxpayer has used the vehicle regardless of the ultimate location to which the winning contestant ultimately takes the vehicle and regardless of Taxpayer's status as a listed owner on the vehicle title. IC § 6-2.5-3-1(a).

B. Contractual Provision.

Taxpayer asserts that the contractual terms it entered into with the dealer prohibit Taxpayer from acquiring title and prohibits a real transaction from taking place. However, IC § 6-2.5-4-1(c) provides, "For purposes of determining what constitutes selling at retail, it does not matter whether... the property is transferred conditionally or otherwise." Additionally, Indiana embraces substance over form in tax compliance. Taxpayer paid for the vehicles and then exercised a right or power of ownership by designating a specific person to receive each vehicle. If Taxpayer had no rights to the vehicles or power of control over the vehicles as Taxpayer has asserted, then Taxpayer would have no authority to designate the person who was to receive each vehicle. Moreover, Taxpayer's assertion would allow any person purchasing a vehicle to circumvent the sales and use tax laws by simply signing a contract stating that title does not transfer on purchase because purchaser has only purchased right to transfer. Since Taxpayer both pays for the vehicles and designates who will receive the vehicles, Taxpayer "used" the vehicles in Indiana. Accordingly, the sales and use tax liability is that of the current Taxpayer in all circumstances, not that of the winner, contractual terms notwithstanding.

C. Double Taxation.

Taxpayer asserts that a majority of the winners paid sales tax to the dealership or to the Indiana Department of Motor Vehicles, and the Department's assessment of sales and use tax on Taxpayer results in double taxation. Double taxation means that the same receipts are subjected to the same tax twice--once on receipt from the Taxpayer and once again on receipt by winners. However, Taxpayer has not provided any documentation showing that the winners did in fact pay sales tax.

Notwithstanding, even if Taxpayer had provided documentation establishing that the winners had paid sales tax, Taxpayer assertion ignores the fact that there were two separate transactions/transfers of the vehicle that occurred and were subject to sales and use tax. The first transaction was when the vehicle was transferred to Taxpayer upon Taxpayer's payment and use of the vehicle, and the second transaction was when the vehicle was transferred to the winner. Accordingly, Taxpayer incurred its sales and use tax liability at the time of payment and "use" of the vehicle in Indiana, and the winners' alleged subsequent payment of sales tax for the winners' transactions does not discharge Taxpayer's liability for Taxpayer's transaction. Moreover, if a winner had wrongfully paid sales tax on its transaction, it would be the winner who would be entitled to seek a claim for refund with the Department and not Taxpayer.

FINDING

Taxpayer's protest is respectfully denied.

II. Sales and Use Tax–Complimentary Meals and Merchandise.

DISCUSSION

Taxpayer protests the imposition of use tax with respect to complimentary meals and merchandise transferred to customers. The Taxpayer asserts that the transfers are nontaxable complimentary transfers, which are not subject to sales and use tax.

In *Horseshoe Hammond, Inc. v. Indiana Dep't of State Revenue*, 865 N.E.2d 725 (Ind. Tax Ct. 2007), *transfer denied*, 2007 Ind. Lexis 641, the Tax Court found that the transfers of meals and merchandise at issue were complimentary transfers rather than sales of tangible personal property and were not subject to the imposition of sales and use tax. *Id*. at 729-32.

Taxpayer has provided sufficient information to establish that the transfers of meals and merchandise at issue were made under the same facts and circumstances as those made in *Horseshoe Hammond*.

FINDING

The Taxpayer's protest is sustained.

III. Sales and Use Tax–Expense Purchases.

DISCUSSION

Taxpayer protests the imposition of sales and use tax on certain expense purchases. The Department found that Taxpayer had made a variety of purchases on which Indiana sales tax was not paid at the time of purchase nor was use tax remitted to the Department. As discussed previously, Indiana imposes "an excise tax, known as the use tax," on tangible personal property that is acquired in retail transactions and is stored, used, or consumed in Indiana. IC § 6-2.5-3-2(a).

A. "Marine Engine Overhaul."

Taxpayer protests the imposition of use tax on its purchase of a "marine engine overhaul." Taxpayer asserts that it paid sales tax at the time of purchase and should not be assessed use tax for this amount.

IC § 6-8.1-5-4(a) provides:

Every person subject to a listed tax must keep books and records so that the department can determine the amount, if any, of the person's liability for that tax by reviewing those books and records. The records referred to in this subsection include all source documents necessary to determine the tax, including invoices, register tapes, receipts, and canceled checks.

Accordingly, it is Taxpayer's responsibility to retain the documentation that supports that the tax was paid.

In the course of the protest, Taxpayer submitted a purchase order and a purchase authorization form. However, the documents submitted were insufficient to prove the amount of sales tax that was actually paid at the time of purchase. Moreover, Taxpayer did not cite any statute, regulation, or case law for the proposition that the auditor was required to accept Taxpayer's bare assertion without providing the supporting documentation. Pursuant to IC § 6-8.1-5-1(c), all tax assessments are presumed to be accurate, and the taxpayer bears the burden of proving that an assessment is incorrect. Since Taxpayer failed to produce any documentation that demonstrates that the Department's assessment was incorrect, then Taxpayer has failed to meet its burden to prove that sales tax was paid at the time of purchase.

Therefore, Taxpayer's protest is respectfully denied.

B. Decorations.

Taxpayer protests the imposition of use tax on its purchase of decorations. Taxpayer asserts that it purchased the decorations without paying sales tax at the time of purchase, but did remit use tax to the Department on its annual use tax return.

Taxpayer has provided sufficient information to establish that use tax was remitted to the Department on the $410.05 purchase of decorations, which is described on page 27 of the audit report.

Therefore, Taxpayer's protest is sustained.

C. "Aluminum Entrance Ramps."

Taxpayer protests the imposition of use tax on its purchase of "aluminum entrance ramps." Taxpayer asserts that the $8,000 charge, listed on page 15 of the audit report, for the April 18, 2002 purchase of "aluminum entrance ramps" included a $5,800 separately state charge for services, which are exempt from sales and use tax.

Taxpayer has provided sufficient documentation to establish that the invoice included a separately state service charge that is exempt from sales and use tax.

Therefore, Taxpayer's protest is sustained.

FINDING

In summary, Taxpayer's protest of subpart A is respectfully denied, and Taxpayer protest of subparts B and C are sustained.

Posted: 01/30/2008 by Legislative Services Agency
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